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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 57

FAWCETT PUBLICATIONS, INC., *Appellant*,

v.

DENNIT MORRIS, *Appellee*.

Appeal from the Supreme Court of Oklahoma

APPELLANT'S REPLY TO MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 741

FAWCETT PUBLICATIONS, INC., *Appellant*,

v.

DENNIT MORRIS, *Appellee*.

Appeal from the Supreme Court of Oklahoma

APPELLANT'S REPLY TO MOTION TO DISMISS

I. All of the Questions Presented By This Appeal Are Reviewable and Warrant Plenary Resolution by the Court

Appellee's Motion to Dismiss confines itself solely to the first question presented in the Jurisdictional Statement, allegedly because questions 2, 3, and 4 do not draw into question the federal constitutional validity of any Oklahoma statute and are thus "not proper questions to be considered on appeal under 28 U.S.C. 1257(2) . . . ." (Motion to Dismiss, p. 2.) This allegation is obviously in error with respect to question 2, which directly challenges

the application to appellant of the Oklahoma "long arm" statute, 18 Okla. Stat. §§ 1.17, 472, as being repugnant to the First Amendment guarantee of freedom of the press.

In any event, it is unnecessary at this stage to consider in depth whether any of the questions presented is technically proper for appeal under 28 U.S.C. § 1257(2). The Court is well aware that 28 U.S.C. § 2103 provides:

> "If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State . . . in a case where the proper mode of review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken . . . ."

Accordingly, if some or all of the questions presented in a jurisdictional statement are not technically proper for appeal but qualify for certiorari review, the Court automatically considers and acts upon such questions as if they were presented in a petition for writ of certiorari. *E.g.*, *Anonymous* v. *Baker*, 360 U.S. 287, 290 (1959); *Raley* v. *Ohio*, 360 U.S. 423, 435 (1959); *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530, 547 (1922). And, as the Court expressly recognized in *Flournoy* v. *Wiener*, 321 U.S. 253, 263 (1944), an appellant may include in his jurisdictional statement, in addition to appealable questions, "any other denial of federal right whether or not capable in itself of being brought here by appeal." See Stern and Gressman, Supreme Court Practice § 3-6, at 73 (3rd ed., 1962).

By all relevant standards, the questions presented in this case clearly merit review and resolution by the Court. Indeed, the substantiality and importance of the due process and freedom of the press issues here at stake are directly attested by the Court's recent grant of certiorari in the closely similar case of *New York Times Co.* v. *Sullivan*, 144 So. 2d 25 (Ala. 1962), on January 7, 1963,

371 U.S. 946 (No. 606, this Term). The close identity of subject matter, issues, and constitutional principles involved distinctly warrants that this case be set for argument contemporaneously with *New York Times Co.* v. *Sullivan.*

II. Appellee's Argument Concerning Reviewability of the First Question Presented Is Without Substance

Appellee argues that the decision below—which would extend the reach of the State's "long arm" statute to acquire jurisdiction of a foreign publisher whose contacts with the forum have been held by federal courts of appeal and other state courts not to authorize "long arm" jurisdiction as a matter of Fourteenth Amendment due process—does not present a federal question. This argument is wholly insupportable.

As we have pointed out,[1] and as appellee does not dispute, prior decisions of the Oklahoma Supreme Court plainly established that the State's "long arm" statute was intended to reach as far as Fourteenth Amendment due process permits under this Court's precedents which have partially lowered the strict barrier against extra-territorial service of process erected by *Pennoyer* v. *Neff*, 95 U.S. 714 (1877). Since the statute had thus been construed to reach as far as possible without invading Fourteenth Amendment due process, it is clear that a non-resident defendant claiming to be *outside* the reach of the statute is unmistakably and self-evidently asserting that he is *inside* the protection of the Fourteenth Amendment. This objection was made by appellant in this case—as appellee acknowledges— "from the time summons was served."[2] The trial court explicitly understood and passed upon the jurisdictional issue as a federal due process

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[1] Jurisdictional Statement, pp. 17-19.

[2] Motion to Dismiss, p. 4.

question, as demonstrated by its express reliance upon this Court's decisions, including *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).[3] Both appellant and appellee argued the issue on the basis of these and other federal due process cases in the trial court and in the Supreme Court of Oklahoma,[4] which appellee does not deny. These cases unequivocally supplied reference to and reliance upon the Fourteenth Amendment.

In light of these incontestable facts, there is no basis whatever for the statement that a question of Fourteenth Amendment due process was not presented to the court below. The right to obtain review in this Court of federal constitutional deprivations rests on a much stronger footing than the quicksand of mere verbalism or talismanic form. As this Court stated in *Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928):

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
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> "Of course, the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."[5]

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[3] See Jurisdictional Statement, p. 17.

[4] See Jurisdictional Statement, p. 18, n. 9.

[5] To the same effect, see the cases cited in the Jurisdictional Statement, p. 19.

The standards thus described are ones of substance, not mere form, and they are squarely met in this case. They are but another way of saying that state courts cannot defeat review here of federal constitutional questions by disregarding them or concealing them behind specious non-federal grounds of decision.

Of no merit whatever is appellee's suggestion that the court below may actually have concluded, without saying so, that the independent wholesale distributor Mid-Continent News Company was an "agent" of appellant (rather than a "mere conduit"), and hence that the jurisdictional holding may rest on an "adequate non-federal ground."[6] The premise is wholly false, and the conclusion is a *non sequitur*.

The essential legal elements of an agency relationship between appellant and Mid-Continent are palpably lacking, and it would be absurd to pretend otherwise. This is precisely why the court below strained to find some other designation and finally drew out of thin air the label that Mid-Continent was "little more than a mere conduit" of appellant.[7] Whatever may have been meant by this novel coinage, it certainly cannot be put forward as a non-federal ground to support the decision.

The controlling issue is whether the nonresident defendant has had the "minimal contacts" with the forum state "that are a prerequisite to its exercise of power over him" under the due process clause of the Fourteenth Amendment. *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958); *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945). This is inherently and solely a federal question, and a state court's labeling or verbal characterization of the nonresident's contacts with the forum can neither alter

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[6] Motion to Dismiss, p. 11.

[7] Jurisdictional Statement, p. 9a; R. 239.

the true nature of those contacts nor detract from this Court's power and duty to make its own independent analysis and determination of the constitutional effect.

The relationship between appellant and Mid-Continent entails no restraints or conditions beyond those which are commonly, if not universally, found between periodical publishers and independent wholesalers. This fact is readily apparent from the numerous decisions of other courts, cited and discussed in the Jurisdictional Statement,[8] which conflict with the decision below and hold that foreign publishers having the same or more contacts with the forum than does appellant are not amenable to suit there by substituted service. Appellee has not disputed this, and it is clearly indisputable. This conflict of decisions requires definitive resolution by the Court now.

Finally, it should be noted that appellee has not denied, as indeed he could not, that the decision of the court below on the merits constituted a complete and stunningly abrupt departure from prior Oklahoma libel law of long standing. The first question presented (and the others as well), having been explicitly presented in the petition for rehearing, were therefore unquestionably raised in due time and are properly here for review under this Court's settled practice.[9] Appellee's suggestion that the court below may possibly have refused to consider the question of the constitutionality of the statute because it was not raised in the trial court must be rejected. First, it is clear that the question *was* raised in the trial court, as we have already demonstrated. Second, even if this were not the case, it is not true that the Supreme Court of Oklahoma has a categorical rule against considering questions of constitutionality not raised in the trial court, and it is clear that

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[8] Pp. 24-27.

[9] See Jurisdictional Statement, pp. 20-23.

such questions will be considered when they go to jurisdiction or to matters of public interest, policy, or welfare.[10]

CONCLUSION

For the foregoing reasons, and for the reasons presented in the Jurisdictional Statement, it is submitted that this appeal presents substantial and far-reaching federal questions which urgently require resolution by the Court.

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[10] See, *e.g.*, *Simons* v. *Brashears Transfer & Storage Co.*, 344 P.2d 1107, 1108-09 (Okla., 1959); *First Nat'l Bank* v. *Southland Production Co.*, 189 Okla. 9, 112 P.2d 1087, 1098 (1941); *Shaffer Oil & Ref. Co.* v. *County Treasurer*, 175 Okla. 6, 52 P.2d 76 (1935); *Magnolia Petroleum Co.* v. *State*, 175 Okla. 11, 52 P.2d 81 (1935).